

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FRANK ORTIZ, <div style="text-align: right; padding-right: 20px;">Plaintiff,</div>)	
)	
vs.)	3:05-cv-00113-LRH-VPC
)	
DAVID KELLY, <i>et al.</i> ,)	<u>ORDER</u>
)	
Defendants.)	
	/	

This is a civil rights complaint pursuant to 42 U.S.C. §§ 1983, 1985 and 1986. Pending before the court are plaintiff's second motion for summary judgment filed January 8, 2009 (Docket # 241), and defendants' second motion for summary judgment filed February 20, 2009 (Docket # 255). This case proceeds on plaintiff's amended complaint filed September 13, 2005 (Docket # 13).

PROCEDURAL HISTORY¹

Plaintiff is a prisoner incarcerated at Ely State Prison ("ESP"). On August 20, 2003, plaintiff filed a complaint in this court, which was designated case number 3:03-cv-00424-LRH (VPC). The complaint named five defendants and contained two causes of action for violations of plaintiff's Eighth and Fourteenth Amendment rights between March and July 2003, with respect to plaintiff's admission and stay in the ESP Mental Health Unit ("MHU") (Docket #70, Exhibit A). On September 16, 2005, the court granted summary judgment in favor of the defendants (Docket # 70,

¹This procedural history is taken from that set forth in the Report and Recommendation entered in this case by Magistrate Judge Cooke on July 2, 2007.

Exhibit B). Plaintiff did not appeal from the judgment.

On October 18, 2004, plaintiff filed the current lawsuit in state court. Defendants removed the case to this court pursuant to 28 U.S.C. § 1441 on February 25, 2005 (Docket #2). Plaintiff named as defendants the Nevada Department of Corrections (“NDOC”); E.K. McDaniel, ESP Warden; Adam Endel and Dwight Neven, ESP Associate Wardens; Glen Whorton, former ESP Assistant Director of Operations; Claude Willis, ESP Disciplinary Chairman and Hearing Officer; Theodore D’Amico, ESP Medical Director; Fred Klopfer, Ph.D., former ESP Mental Health Physician; and Larry Allphon, Charise Clayton, Loyde Cobb, Charles Coleman, Richard Falge, Frank Graham, Clayton Hall, Cameron Horsley, Jared Howes, Paul Hunt, David Kelly, Rod Lightsey, Herbert Little, Robert Marcum, Arthur Neagle, Conrad Schaff, Robert Sedlacek and Drugh Waggoner, ESP Correctional Officers. Due to various dismissals, the remaining defendants are McDaniel, Endel, Neven, Cobb, Falge, Kelly, Lightsey, Neagle, Schaff, and Sedlacek.

Plaintiff originally brought the following ten causes of action:

- Count I: plaintiff alleges that from 2003 to the present, in violation of his Eighth Amendment right against cruel and unusual punishment, defendants denied him outdoor exercise for extended periods of time, and when he continually requested outdoor time, left him outside for extended periods, sometimes overnight, without adequate clothing, in freezing weather;
- Count II: plaintiff alleges that from 2003 to the present, in violation of his Eighth Amendment right, defendants incited other inmates against plaintiff as punishment by telling other inmates that plaintiff is a child molester and a rat, threatening other inmates with retaliation if they talk to plaintiff, and walking plaintiff past other inmates “with scant clothing while pointing out [plaintiff’s] physical shortcomings;”
- Count III: plaintiff alleges that from 2003 to the present, in violation of his Eighth Amendment right, defendants had a policy of depriving plaintiff of sleep as punishment by leaving the lights on all night, flashing flashlights in plaintiff’s face, and tapping on the window at night to wake him;
- Count IV: plaintiff alleges that from 2003 to the present, in violation of his Eighth Amendment right, defendants had a policy of denying plaintiff access to basic hygiene by denying him water in his cell, keeping him in a cold cell without blankets or a jacket, forcing him to sleep on a urine soaked mattress, withholding showers, serving food with feces, leaving the toilet backed up for days, and stripping his cell so he must sleep on the floor with only boxers and a blanket for weeks;
- Count V: plaintiff alleges that from 2003 to the present, in violation of his Eighth Amendment right, defendants had a policy of physically attacking plaintiff by placing him in four point restraints for two hour stretches for minor infractions, kicking him in the groin while in restraints, hitting him in the shoulder, placing restraints too tightly, and sexually assaulting him;

- 1 • Count VI: plaintiff alleges that, in violation of his First Amendment right, defendants
2 had a policy of restricting plaintiff's ability to petition for redress of grievances by
3 limiting the number of grievances he may file, retaliating against him for filing too
4 many grievances by writing notices of charges ("NOC") or imposing harsher
5 punishment on him, placing him in the "torture chamber" to deter him from filing
6 more grievances, withholding grievance forms, and disregarding grievances that
7 contain disrespectful language;
- 8 • Count VII: plaintiff alleges that from 2003 to the present, in violation of his First
9 Amendment right, defendants had a policy of restricting plaintiff's access to the
10 courts by preventing phone calls with attorneys, shaking down his cell and either
11 confiscating or leaving in disarray his legal papers, forcing plaintiff to appear in court
12 in socks, delaying or urinating in his legal mail, stealing his stamps, refusing to
13 provide him with copies of NOCs against him, flooding his cell to destroy his legal
14 papers, denying him the right to view his medical records except in half-hour
15 stretches, and denying him access to library legal materials, all of which caused him
16 to lose a summary judgment motion and impeded his ability to participate in
17 discovery in "companion" cases;
- 18 • Count VIII: plaintiff alleges that, in violation of his Fourteenth Amendment right to
19 due process, defendants had a policy of filing false NOCs against plaintiff in
20 retaliation for filing grievances, failing to serve notice of scheduled hearing dates,
21 prohibiting him from calling witnesses or putting on a defense at hearings, and
22 refusing to allow the proceedings or activities in his cell to be recorded, all of which
23 has extended his stay in disciplinary segregation to February 13, 2011;
- 24 • Count IX: plaintiff alleges that, in violation of his Fourteenth Amendment right to due
25 process, defendants had a policy of involuntarily placing inmates in disciplinary
26 segregation under the guise of voluntary admission to mental health, where the
27 "torture chamber" is located. Specifically, in March 2003, defendants manufactured
28 false charges against him, forged his name on an admission form, denied him all
rights at his hearing, put him in the "torture chamber," kept him there for extended
periods of time without due process and subjected him to a treatment plan of forced
medication and other circumstances that violated his Eighth Amendment rights;
- Count X: plaintiff alleges that all defendants conspired to deprive him of his right to
equal protection of the laws based on his Mexican nationality.

On January 6, 2006, the court dismissed defendant NDOC (Docket #15). On March 2, 2006, defendant Klopfer filed a motion to dismiss, arguing that the doctrine of *res judicata* barred plaintiff's claims against him (Docket #23). On July 27, 2006, the court approved and adopted Magistrate Judge Cooke's report and recommendation (Docket #33) dismissing defendant Klopfer on *res judicata* grounds (Docket #39 and #40).

On November 30, 2006, NDOC defendants brought a motion for summary judgment, making similar preclusion arguments (Docket #70). On December 13, 2006, plaintiff brought a cross motion for summary judgment (Docket # 74). On March 23, 2007, the court dismissed the following

defendants for failure to effect timely service pursuant to Federal Rule of Civil Procedure 4(m): Allphon, Clayton, Coleman, D'Amico, Graham, Hall, Horsely, Howes, Hunt, Little, Marcum, Waggoner, Whorton, and Willis (Docket #85). On July 2, 2007, Magistrate Judge Cooke entered a report and recommendations, recommending that plaintiff's cross motion for summary judgment (Docket #74) be denied. Magistrate Judge Cooke also recommended that defendants' motion for summary judgment (Docket #70) be granted in part as to: (1) Count IX in its entirety; (2) Counts I, IV, VI (as to grievances while in MHU) and VII (as to flooding of MHU cell) with respect to plaintiff's admittance and incarceration in the MHU between March and July 2003, as to all defendants; and (3) Counts I – VIII with respect to plaintiff's admittance and incarceration in the MHU between March and July 2003, as to defendants McDaniel, Endel and Neven. After allowing the parties to file objections, the court adopted the findings and recommendations on September 5, 2007 (Docket # 106).

On December 16, 2008, the court entered an order directing that motions for summary judgment by the parties on any matters that had not been previously decided by the court should be filed and served on or before February 16, 2009. Now pending before the court are plaintiff's second motion for summary judgment filed January 8, 2009 (Docket # 241), and defendants' second motion for summary judgment filed February 20, 2009 (Docket # 255).

LEGAL STANDARD

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Under summary judgment practice, the moving party

[A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" Id. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion,

1 against a party who fails to make a showing sufficient to establish the existence of an element
2 essential to that party's case, and on which that party will bear the burden of proof at trial. Id. at 322.
3 "[A] complete failure of proof concerning an essential element of the nonmoving party's case
4 necessarily renders all other facts immaterial." Id. In such a circumstance, summary judgment
5 should be granted, "so long as whatever is before the district court demonstrates that the standard for
6 entry of summary judgment, as set forth in Rule 56(c) is satisfied." Id. at 323.

7 If the moving party meets its initial responsibility, the burden then shifts to the opposing
8 party to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec.
9 Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

10 In attempting to establish the existence of this factual dispute, the opposing party may not
11 rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form
12 of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists.
13 Rule 56(e); Matsushita, 475 U.S. at 586 n.11. The opposing party must demonstrate that the fact in
14 contention is material, i.e., a fact that might affect the outcome of the suit under the governing law,
15 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec.
16 Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the
17 evidence is such that a reasonable jury could return a verdict for the nonmoving party, Wool v.
18 Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

19 In the endeavor to establish the existence of a factual dispute, the opposing party need not
20 establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual
21 dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at
22 trial." T.W. Elec. Serv., 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the
23 pleadings and to assess the proof in order to see whether there is a genuine need for trial.'"
24 Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963
25 amendments).

26 In resolving the summary judgment motion, the court examines the pleadings, depositions,
27 answers to interrogatories, and admissions on file, together with the affidavits, if any. Rule 56(c).
28 The evidence of the opposing party is to be believed, Anderson, 477 U.S. at 255, and all reasonable

1 inferences that may be drawn from the facts placed before the court must be drawn in favor of the
2 opposing party, Matsushita, 475 U.S. at 587 (citing United States v. Diebold, Inc., 369 U.S. 654, 655
3 (1962)(per curiam). Nevertheless, inferences are not drawn out of the air, and it is the opposing
4 party's obligation to produce a factual predicate from which the inference may be drawn. Richards v.
5 Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th
6 Cir. 1987).

7 Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show
8 that there is some metaphysical doubt as to the material facts. Where the record taken as a whole
9 could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for
10 trial.'" Matsushita, 475 U.S. at 587 (citation omitted).

11 DISCUSSION

12 Spoliation

13 On September 23, 2008, Plaintiff filed a motion seeking a finding that defendants committed
14 acts of spoliation (Docket # 188). Defendants filed a response to that motion on October 13, 2008
15 (Docket # 203). On December 4, 2008, plaintiff filed a second motion for a finding of spoliation
16 against defendants (Docket # 234). Defendants filed a response to that motion on December 15,
17 2008 (Docket # 235). In his first motion, plaintiff claims that two documents from 2003 are missing
18 from his property file. In his second motion, plaintiff lists five documents which he claims are
19 missing. Plaintiff asks the court to find that these documents were intentionally destroyed, thus
20 allowing plaintiff to argue a negative inference against defendants. Although both of these motions
21 were filed in the context of a pending trial, plaintiff references them in his opposition to defendants'
22 motion for summary judgment.

23 After defendants opposed plaintiff's first motion for spoliation, plaintiff moved to strike the
24 opposition as untimely (Docket # 209) and defendants opposed the motion to strike (Docket # 217).
25 In his reply to that opposition, plaintiff admitted he had failed to demonstrate that any spoliation
26 occurred, stating "it is true that Plaintiff has not demonstrated that in fact 'spoliation' has occurred,
27 but only because he can only show that the documents in question are being withheld." (Docket #
28 227 at 3). Plaintiff then asked the court to order defendants to produce the documents.

1 The time for discovery in this case is long past, and plaintiff does not make the showing
2 necessary under Rule 56(f), Federal Rules of Civil Procedure, to allow other discovery to be
3 undertaken. Accordingly, the court rejects plaintiff's request for relief in the form of further
4 discovery.

5 The spoliation of evidence rule is a rule of evidence to be administered at the discretion of
6 the court. Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995). The trial court has
7 broad discretion to permit a jury to draw adverse inferences from the loss or destruction of evidence
8 against the party responsible for that behavior. Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir.
9 1993). In this case, the court finds that plaintiff has not demonstrated that any of the documents in
10 question were lost or withheld by any defendant in this case. Plaintiff merely asserts that the
11 documents are missing from his file and then presumes that defendants are responsible. Further, as
12 defendants argue, there is no evidence before the court that the documents were not missing prior to
13 the filing of the instant litigation. The court therefore declines to find spoliation in this case and will
14 not draw any negative inference in its consideration of the pending motions for summary judgment.

15 **Defendants' Motion for Summary Judgment**

16 First Cause of Action

17 In his first cause of action, plaintiff alleges that defendants have a policy of depriving inmates
18 of outdoor exercise as a punishment, and have used this method to punish and retaliate against
19 plaintiff on many occasions from 2003 to the present by denying him exercise for months at a time.
20 Plaintiff also alleges that alternatively, to discourage plaintiff from requesting outdoor exercise,
21 defendants have on many occasions when he has demanded outdoor exercise left plaintiff outside for
22 extended periods, including overnight, without adequate clothing in freezing weather. Plaintiff
23 alleges that by subjecting him to the above treatment, Defendants subjected him to cruel and unusual
24 punishment in violation of the Eighth Amendment and deprived him of his right to due process
25 under the Fourteenth Amendment.

26 Defendant asserts that plaintiff's disciplinary history for the relevant period of time shows
27 that plaintiff was sanctioned for a loss of yard three times between 2003 and 2005. These include the
28 following:

- 1 ● March 21, 2003 - loss of yard for 10 days as a result of a G18 (delaying, hindering,
2 interfering with staff)
- 3 ● March 26, 2003 - loss of yard of 10 days as a result of a G18 (delaying, hindering,
4 interfering with staff)
- 5 ● July 10, 2003 - loss of yard for 90 days as a result of a MJ 28 (work
6 stoppage/demonstration).

7 To prevail on a “conditions of confinement” claim, a plaintiff must show serious deprivation
8 and deliberate indifference. See Wilson v. Seiter, 501 U.S. 294, 297-300, 111 S.Ct. 2321,
9 2323-2325 (1991). The Ninth Circuit has held that exercise is “one of the basic human necessities
10 protected by the Eighth Amendment.” LeMaire v. Maass, 12 F.3d 1444, 1457 (9th Cir.1993).

11 In regard to the two sanctions of loss of yard for 10 days, defendants argue that this 20 day
12 loss of yard does not amount to a serious deprivation. Defendants rely on May v. Baldwin, 109 F.3d
13 557, 565 (9th Cir. 1997), in which a prisoner was deprived of outdoor exercise for 21 days while in a
14 disciplinary segregation unit. The Ninth Circuit reiterated the established standard for a “conditions
15 of confinement” claim; i.e., that a plaintiff must show serious deprivation and deliberate
16 indifference. Id. at 565. It held, however, that “a temporary denial of outdoor exercise with no
17 medical effects is not a substantial deprivation.” Id. It found the 21-day loss of yard distinguishable
18 from the long-term deprivations discussed in Allen v. Sakai, 48 F.3d 1082, 1088 (9th Cir.1994)
19 (stating that a long-term deprivation of exercise is a denial of a basic human need in violation of the
20 Eighth Amendment), cert. denied, 514 U.S. 1065, 115 S.Ct. 1695 (1995), and Spain v. Proconier,
21 600 F.2d 189, 199-200 (9th Cir.1979) (concluding that the deprivation of outdoor exercise for a
22 “period of years” contravenes the Eighth Amendment). It thus affirmed the district court’s grant of
23 summary adjudication to the defendants on the Eighth Amendment claim.

24 In regard to plaintiff’s 90-day loss of yard, defendants note initially that this loss of yard was
25 a sanction imposed for misconduct on the exercise yard. Plaintiff was charged with three general
26 violations and a major violation, and was found guilty on all charges. Defendants argue that the
27 sanction imposed was authorized by NDOC Administrative Regulation (“AR”) 707, because the
28 violations occurred while plaintiff was on the exercise yard and also because plaintiff was found

1 guilty of a major violation.

2 Defendants rely on LeMaire v. Maass, in which the plaintiff argued that the deprivation of
3 outdoor exercise for nearly five years constituted cruel and unusual punishment. The Ninth Circuit
4 rejecting that claim, finding that the subjective requirements for an Eighth Amendment violation
5 were not met. Id. at 1458. The court specifically held that the decision by prison officials to limit
6 the plaintiff's outside exercise privileges does not reflect "deliberate indifference," nor was the
7 restriction imposed "maliciously or sadistically for the very purpose of causing harm." Id.
8 The court rested its decision on the fact that the prison authorities had limited the plaintiff's outdoor
9 activities based on his own misconduct, which they found raised serious and legitimate security
10 concerns within the prison. Id. The court found:

11 Thus LeMaire's claim does not survive scrutiny under the subjective analysis
12 mandated by Wilson. Unlike the situation in Spain, the DSU does not have a broad
13 policy which prohibits outside exercise for all inmates. DSU inmates free of
14 infractions for forty-five days have abundant exercise privileges available to them in
15 the DSU. This includes exercise privileges outside of their cells and out-of-doors five
days a week. All LeMaire had to do was to follow the rules. In each instance resulting
in the curtailment of his exercise privileges, LeMaire was afforded an appropriate
hearing before the sanction was imposed. At no time was the imposition of this
sanction arbitrary or capricious.

16 Id. Defendants argue that plaintiff's loss of yard for 3 months is not unlike the situation in LeMaire.
17 They stress that inmates confined to the ESP infirmary unit ordinarily receive five hours of outdoor
18 exercise per week. Further, as with LeMaire, plaintiff's 90-day loss of outdoor exercise privileges
19 came about as a direct result of plaintiff's disciplinary violation, for which he received the sanction
20 of loss of yard at a disciplinary hearing. Defendants conclude, therefore, that as the Ninth Circuit
21 found in LeMaire, plaintiff's loss of yard privileges did not amount to a violation of the Eighth
22 Amendment.

23 Finally, Defendants argue that they are entitled to summary adjudication on plaintiff's claim
24 that he was left outside on the exercise yard. Plaintiff claimed in his deposition, D MSJ 7, that
25 defendants, who were supervisory staff, failed to follow the policy of forcing him to come in off the
26 yard after he "captured the yard," i.e., failed to come in. Defendants argue that they are entitled to
27 summary adjudication on this claim, because a prison official's failure to follow a prison regulation
28 does not state a claim unless a liberty interest is involved.

1 Additionally, defendants argue that even if his claim that supervisory personnel failed to
2 follow policy did state a claim, Plaintiff cannot make the requisite showing of personal participation
3 by a named defendant. Defendants rely on Taylor v. List, 880 F.2d 1040, in which the court held that
4 personal liability under Section 1983 arises only upon a showing of personal participation by a
5 defendant. Specifically, defendants argue that plaintiff cannot show that any of the named
6 defendants actually participated in the act of leaving plaintiff on the yard.

7 Supervisory personnel are generally not liable under section 1983 for the actions of their
8 employees under a theory of respondeat superior and, therefore, when a named defendant holds a
9 supervisory position, the causal link between him and the claimed constitutional violation must be
10 specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979); Mosher v. Saalfeld,
11 589 F.2d 438, 441 (9th Cir. 1978), cert. denied, 442 U.S. 941 (1979). In this case, plaintiff does not
12 allege supervisory liability, but rather direct liability on the part of defendants. Specifically, he
13 alleges in his amended complaint that, “defendants have on many occasions when he has
14 vociferously demanded outdoor exercise left ORTIZ outside for extended periods (sometimes
15 overnight) without adequate clothing in freezing weather in the dead of winter.” As defendants
16 argue, because plaintiff cannot show that any named defendant participated in leaving him on the
17 yard, he cannot not show the requisite personal participation necessary to state a claim against any
18 named defendant.

19 The court finds that defendants have met their burden as the moving parties of informing the
20 court of the basis for their motion. The burden therefore shifts to plaintiff to establish the existence
21 of a genuine issue as to any material fact. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
22 475 U.S. at 586. In opposing defendants’ motion for summary judgment, plaintiff repeats his claim
23 that defendants Kelly and Sedlacek deprived him of outdoor exercise for months on end. He states,
24 however, that his claim against defendants Kelly and Sedlacek have nothing to do with sanctions
25 imposed under the NDOC code of discipline. Rather, plaintiff states that his claim against these
26 defendants relates to instances when the defendants would simply not ask him whether he wanted
27 yard, but falsely claimed that they called plaintiff and he either refused or failed to respond. Plaintiff
28 argues that the fact that this conduct violated NDOC policies constitutes circumstantial evidence that

1 the defendants acted in retaliation

2 Plaintiff argues that, “[t]he allegations in this first cause of action, if taken by themselves may
3 not constitute violations of the plaintiff’s rights. But when taken as part of the whole . . .
4 generally, they all constitute violations of his rights.” While plaintiff claims that defendants cannot
5 prove that Kelly and Sedlacek did not deprive him of yard in the manner he suggests, plaintiff also
6 admits that he cannot prove that they did. He therefore concludes that this constitutes a material fact
7 on which reasonable minds could differ, implying that the issue needs to go to a jury. Plaintiff’s
8 analysis is faulty.

9 Plaintiff is correct that whether defendants deprived him of outdoor exercise for months on
10 end is a material fact in this case. Plaintiff, however, has not carried his burden as the party opposing
11 defendants’ motion for summary judgment of establishing that a genuine issue as to this fact actually
12 exists. That is, plaintiff has merely relied on the allegations in his complaint, and has not tendered
13 evidence of specific facts in support of his contention. This is insufficient under Rule 56(e) to show
14 the existence of a genuine issue for trial. Further, the court finds that under the law cited by
15 defendants and discussed above, defendants are entitled to judgment on this each issue raised in this
16 cause of action. Accordingly, the court will grant defendants summary adjudication on the first
17 cause of action.

18 Second Cause of Action

19 In his second cause of action, Plaintiff alleges that defendants have a policy of inciting other
20 inmates against him as punishment, and have used this method to punish and retaliate against him on
21 many occasions. Specifically, plaintiff alleges that defendants have carried out this policy by telling
22 other inmates that plaintiff is a child molester and a rat, by threatening other inmates with retaliation
23 if they talk to plaintiff, and by walking plaintiff past other inmates with scant clothing while pointing
24 out plaintiff’s physical shortcomings to other inmates. Plaintiff claims that this violated his right to
25 be free of cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendment.

26 As defendants argue, it is well-settled that mere verbal harassment or abuse is not sufficient
27 to state a constitutional deprivation under 42 U.S.C. § 1983. Oltarzewski v. Ruggiero, 830 F.2d 136,
28 139 (9th Cir. 1987). Defendants further argue, based on plaintiff’s deposition, that there is no

1 evidence that he was ever physically attacked or harmed as a result of the alleged statements to other
2 inmates regarding plaintiff being a child molester or a rat. D MSJ 11 at 38:12-15.

3 In regard to plaintiff's claim that defendants threatened other inmates with retaliation if they
4 spoke to plaintiff, defendants argue that plaintiff does not have standing to assert this claim involving
5 defendants' actions towards other inmates. The court must agree. Among the requirements for
6 standing under Article 3 of the Constitution is that the plaintiff must have suffered an injury in fact,
7 this is, an invasion of a legally protected interest. See Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871,
8 889, 110 S.Ct. 3177 (1990). An allegation that defendants retaliated against other inmates does not
9 allege an injury to plaintiff.

10 Finally, in regard to plaintiff's claim that defendants walked him through the tier wearing
11 "scant clothing" while they pointed out his shortcomings to other inmates, it is undisputed that ESP
12 IP 7.11 governs the restraint requirements when ESP inmates in lockdown units are escorted to the
13 showers. ESP IP 7.11 requires that inmates being escorted to the showers wear only underwear and
14 shoes, and that they be restrained with wrist and ankle restraints. D MSJ 63. Plaintiff admits that he
15 was wearing boxer shorts and shoes while being escorted to the shower. D MSJ 9 at 33:23-24.
16 Thus, the court finds that defendants are correct in arguing that established policy was followed in
17 moving plaintiff to the shower, as he was confined to a disciplinary unit. Any comments regarding
18 plaintiff's physical shortcomings amount to verbal harassment or taunting. As set forth above, these
19 do not amount to an actionable constitutional violation

20 The court finds that defendants have met their burden as the moving parties of informing the
21 court of the basis for their motion. The burden therefore shifts to plaintiff to establish the existence
22 of a genuine issue as to any material fact. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
23 475 U.S. at 586 . The court finds that plaintiff has failed to carry this burden in regard to his first
24 cause of action. In particular, the court finds that in opposing defendants' motion, plaintiff has
25 simply repeated his claims of defendants inciting other inmates to act against him, placing him in
26 harm's way. Plaintiff has not alleged any physical harm arising from the verbal harassment he claims
27 he suffered. Because plaintiff has not established a genuine issue of material fact regarding physical
28 harm, the court finds that under the law set forth above, defendants are entitled to judgement as a

1 matter of law on these claims. Accordingly, the court will grant defendants summary adjudication on
2 the second cause of action.

3 Third Cause of Action

4 In his third cause of action, plaintiff alleges that defendants have exercised a policy of
5 depriving him of sleep, and have used this method to punish him and retaliate against him on many
6 occasions. Specifically, plaintiff alleges that defendants have done so by turning on lights in his cell
7 and ante room and leaving them on all night, flashing lights in his face when he is asleep and then
8 walking away laughing when he is roused from sleep, and tapping on the window to his cell to wake
9 him in the middle of the night. Plaintiff alleges that this behavior violates his right under the Eighth
10 Amendment to be free of cruel and unusual punishment.

11 In his deposition, plaintiff could not identify any defendant who had participated in these
12 alleged activities. D MSJ 11 at 41: 7-22, 13 at 48:20-21. Defendants argue that without a showing
13 of personal participation by one or more of the defendants, plaintiff cannot show personal liability.
14 Specifically, defendants argue that plaintiff cannot show that any of the named defendants actually
15 participated in any of the conduct he alleges in his third cause of action.

16 In opposing defendants' motion for summary judgment, plaintiff does not identify any
17 defendant who participated in the activities alleged in the third cause of action. Rather, he discusses
18 factual allegations made in connection with the fourth cause of action. Liability under § 1983 arises
19 only upon a showing of personal participation by the defendant." Taylor v. List, 880 F.2d at 1045.
20 Here, plaintiff has failed to establish the existence of this essential element of this cause of action.
21 Under Celotex, the court must therefore enter summary judgment for defendants on this third cause
22 of action.

23 Fourth Cause of Action

24 In his fourth cause of action, plaintiff alleges that defendants have a policy, which they have
25 exercised on many occasions, of denying him access to personal hygiene items as punishment.
26 Plaintiff claims that defendants have used this method to punish him and retaliate against him by
27 doing the following: 1) turning the water to plaintiff's cell on for only five minutes per hour but not
28 telling him when it is turned on, thereby keeping him from getting water to drink and from flushing

1 his toilet, forcing him to urinate in the floor drain of his cell; 2) forcing plaintiff to remain in a cold
2 cell without an extra blanket or a jacket; 3) forcing plaintiff to sleep on a mattress with bedding that
3 was soaked with urine by another inmate while acknowledging this and laughing about it; 4) not
4 allowing plaintiff to take a shower for more than a week; 5) passing food to plaintiff through a food
5 slot contaminated by other inmates with feces and refusing to clean it; 6) leaving the toilet in
6 plaintiff's cell backed up for days on end; and 7) confiscating every single item in plaintiff's cell
7 except one pair of boxer shorts and a blanket, thereby forcing him to sleep on the floor for weeks at a
8 time. Plaintiff contends that by engaging in these acts, defendants violated his right under the Eighth
9 Amendment to be free of cruel and unusual punishment.

10 To constitute cruel and unusual punishment in violation of the Eighth Amendment, prison
11 conditions must involve "the wanton and unnecessary infliction of pain." Rhodes v. Chapman, 452
12 U.S. 337, 347 (1981). Although prison conditions may be restrictive and harsh, prison officials must
13 provide prisoners with food, clothing, shelter, sanitation, medical care, and personal safety. Id.;
14 Toussaint v. McCarthy, 801 F.2d 1080, 1107 (9th Cir. 1986); Hoptowit v. Ray, 682 F.2d 1237, 1246
15 (9th Cir. 1982). Where a prisoner alleges injuries stemming from unsafe conditions of confinement,
16 prison officials may be held liable only if they acted with "deliberate indifference to a substantial risk
17 of serious harm." Frost v. Agnos, 152 F.3d 1124, (9th Cir. 1998) (citing Farmer v. Brennan, 511 U.S.
18 825, 835 (1994)). The deliberate indifference standard involves an objective and a subjective prong.
19 First, the alleged deprivation must be, in objective terms, "sufficiently serious." Farmer v. Brennan,
20 511 U.S. at 834 (citing Wilson v. Seiter, 501 U.S. 294, 298 (1991)). Second, the prison official must
21 "know of and disregard an excessive risk to inmate health or safety." Id. at 837. Thus, "a prison
22 official may be held liable under the Eighth Amendment for denying humane conditions of
23 confinement only if he knows that inmates face a substantial risk of harm and disregards that risk by
24 failing to take reasonable measures to abate it." Farmer v. Brennan, 511 U.S. at 835. Prison officials
25 may avoid liability by presenting evidence that they lacked knowledge of the risk, or by presenting
26 evidence of a reasonable, albeit unsuccessful, response to the risk. Id. at 844-45. Mere negligence
27 on the part of the prison official is not sufficient to establish liability, but rather, the official's
28 conduct must have been wanton. Farmer v. Brennan, 511 U.S. at 835; Frost v. Agnose, 152 F.3d at

1 1128; see also Daniels v. Williams, 474 U.S. 327, 33 (1986).

2 The following facts are undisputed. ESP cell 9A30 is one of several seclusion cells, which
3 are cells designed to hold inmates who are difficult to manage, including those who exhibit behavior
4 that is assaultive or destructive. D MSJ 277, D MSJ 11 at 40: 18 -19. Cell 9A30 has a double door
5 configuration, one door leading into an “ante room,” and the second door leading into the cell. D
6 MSJ 803 -805. The water in cell 9A30 is controlled from outside the cell to prevent inmates from
7 plugging and/or overflowing toilets or showers in order to flood the inmate’s cell or unit. Cell 9A30
8 contains a food box, as an alternative to a food slot, which is designed to further limit an inmate’s
9 contact with officers. D MSJ 804. Plaintiff’s disciplinary history reflects that he was transferred to
10 cell 9A30 on March 5, 2003, where he remained until August 6, 2003.

11 In regard to plaintiff’s claim that defendants turned the water to plaintiff’s cell on for only
12 five minutes per hour without telling him when, defendants argue that at his deposition, Plaintiff
13 could not identify any named defendant who he claims deprived him of his five minutes of water. D
14 MSJ 14 at 55.

15 In response to plaintiff’s claim that he was forced to sleep on a urine soaked mattress,
16 defendants note that his grievance filed March 12, 2003, plaintiff admits that he complained about
17 the mattress and received a replacement mattress the same day. D MSJ 270. Defendants argue
18 therefore, that to the extent plaintiff’s grievances demonstrate that he was forced to sleep one night
19 on a mattress that had urine on it, he fails to state an Eighth Amendment claim. Defendants cite
20 Hunt v. Downing, 112 F.3d 452 (10th Cir. 1997), in which the court held that a detainee’s claim that
21 he was forced to sleep one night in “urinated sheets” did not state a claim for violation of his rights
22 under the Eighth Amendment.

23 In regard to plaintiff’s claim that he was not allowed to take a shower for more than a week,
24 defendants assert that plaintiff’s special handling designation required that he receive a shower every
25 72 hours. Plaintiff was unable to state at his deposition when he was deprived of a shower for more
26 than one week. D MSJ 17 at 63:25. Defendants note one incidence where plaintiff went more than
27 three days but less than one week without a shower. They argue, however, that there is no evidence
28 that this was done intentionally or that plaintiff’s failure to receive a shower amounted to a

1 significant deprivation as required under the Eighth Amendment.

2 Although plaintiff claims that he was passed food through a food slot contaminated with
3 other inmates' feces, defendants argue that there is no Eighth Amendment claim here, because
4 plaintiff was written up for putting his own excrement in the food box and then refusing to clean it
5 up. D MSJ 560, 563. Plaintiff also admitted in his deposition that he repeatedly poured a mixture of
6 feces and urine into the food box, where it would also run onto the anteroom floor. D MSJ 18 at 68-
7 69.

8 Defendants assert that they are entitled to summary judgment on plaintiff's claim that his
9 claim that his toilet was backed up for days on end. They argue that plaintiff evidences a complete
10 lack of personal knowledge about this claim, demonstrating that there is no triable issue of fact for
11 trial. In his deposition, plaintiff indicated that he did not know when this occurred, where he was
12 housed when it occurred, who was responsible, or how many times he alleged the toilet was plugged
13 up. D MSJ 18 - 19 at 69-71.

14 Finally, defendants respond to plaintiff's claims that everything in his cell was confiscated
15 except one pair of boxer shorts and a blanket, requiring him to sleep on the floor for weeks at a time,
16 and that he was forced to remain in a cold cell without an extra blanket or jacket.
17 It is undisputed that in an emergency grievance filed March 25, 2003, plaintiff states that he turned in
18 all of his bedding for a linen exchange, but did not receive his linens back, in addition to his mattress
19 and pillow being confiscated. D MSJ 279. Plaintiff was issued two suicide blankets instead. *Id.* In
20 the emergency grievance, plaintiff identified Officers Williams, Romero, Little and Horsely as the
21 individuals confiscating his mattress and pillow. Defendants argue that because none of these
22 defendants are current defendants in this case, plaintiff cannot demonstrate that any named defendant
23 personally participated in plaintiff having his bedding, mattress and pillow removed from his cell.

24 Defendants further argue that plaintiff received four write-ups in three days, between March
25 18 and March 20, 2003, for using bedding items to stop up the toilet and flood his cell. D MSJ 472-
26 671. Defendants claim that they thus had a legitimate reason to confiscate plaintiff's bedding,
27 mattress, and pillow, where he had used all of these items to flood his cell immediately prior to the
28 items being confiscated. Defendants stress that plaintiff was provided with two suicide blankets

1 until he received his property items back. Thus, they argue, the deprivation was not sufficiently
2 serious to meet the objective element of the deliberate indifference standard. Finally, defendants
3 argue that there is no evidence that the confiscation and withholding of plaintiff's bedding was done
4 maliciously or sadistically to cause harm, as required for the subjective element of deliberate
5 indifference.

6 The court finds that defendants have met their burden as the moving parties of informing the
7 court of the basis for this portion of their motion. The burden therefore shifts to plaintiff to establish
8 the existence of a genuine issue as to any material fact. See Matsushita Elec. Indus. Co. v. Zenith
9 Radio Corp., 475 U.S. at 586 . Plaintiff, however, has not done so. Plaintiff has again merely
10 repeated the allegations in his complaint, and has not tendered evidence of specific facts in support
11 of his contentions. This is insufficient under Rule 56(e) to show the existence of a genuine issue of
12 fact which would necessitate a trial. In addition, the court finds that under the law discussed above,
13 defendants are entitled to judgment on these issues. Accordingly, the court will grant defendants
14 summary adjudication on this fourth cause of action.

15 Fifth Cause of Action

16 In his fifth cause of action, plaintiff contends that Defendants have exercised a policy of
17 physically attacking him as punishment. He claims that they have used this method to punish him
18 and retaliate against him on many occasions by the following: 1) placing plaintiff in four-point
19 restraints for two 2-hour stretches within a 24-hour period for minor infractions; 2) kicking plaintiff
20 in the groin while confined in four-point restraints; 3) hitting plaintiff in the shoulder; 4) purposely
21 placing ankle restraints on plaintiff too tightly; and 4) sexually assaulting plaintiff by forced digital
22 penetration of the anal opening and threatening to repeat the action if plaintiff filed any more
23 grievances. Plaintiff claims that by engaging in these activities, defendants subjected him to cruel
24 and unusual punishment in violation of the Eighth and Fourteenth amendments.

25 DOP Information Bulletin ("IB") 93-58, in effect during 2003², governed restraining inmates

27 ²Defendants explain that once it was adopted by the Board of Prison Commissioners, IB 93-58
28 became AR 655, which remained in effect until 2004, when it was subsumed into AR 645.

1 who demonstrated self-injurious behavior. D MSJ 96-99. It provides in part that “in an emergency
2 situation, *i.e.*, when an inmate is an imminent threat to self or others, a registered nurse may place an
3 inmate in restraints and obtain a physician’s order within two (2) hours.” D MSJ 097 at § B(1).
4 Plaintiff contended in his deposition that this policy was violated because he was placed in 4-point
5 restraints for a two- hour policy twice in twenty-four hours. Plaintiff’s contention is based on his
6 interpretation of Section B(7) of IB 93-58, which states, “restraints shall not be applied for longer
7 than twenty-four (24) hours, unless specific suicidal or violent behavior is again evidenced at the end
8 of said twenty-four (24) hour period.”

9 The court agrees with defendants that plaintiff’s argument that Section B(7) prohibits the
10 application of restraints twice in a 24-hour period is an incorrect interpretation of the clear language
11 of the directive and forms no basis for a constitutional claim. Further, the court agrees with
12 defendants that the evidence, including plaintiff’s own deposition testimony, demonstrates that both
13 times plaintiff was placed in four-point restraints, it was because he was kicking the cell door,
14 jumping up and down on his bed, and beating on the walls. D MSJ 165 at 61:11-13; D MSJ 20 at
15 75:17-20; D MSJ 544. The court finds that defendants have met their burden as the moving parties
16 of informing the court of the basis for this portion of their motion. The burden therefore shifts to
17 plaintiff to establish the existence of a genuine issue as to any material fact. See Matsushita Elec.
18 Indus. Co. v. Zenith Radio Corp., 475 U.S. at 586 .

19 In his opposition to defendants’ motion for summary judgment, plaintiff disavows the
20 argument made in his deposition that placing him in restraints twice in a 24-hour period violates the
21 regulation. He argues rather that placing him in the restraints was a form of punishment and
22 retaliation. As stated above, defendants have presented evidence to support their claim that plaintiff
23 was placed in restraints because he was kicking the cell door, jumping up and down on his bed, and
24 beating on the walls. Plaintiff, however, proffers no evidence suggesting that he was placed in
25 restraints for two hours on two consecutive days maliciously or sadistically, or that he therefore
26 suffered substantial deprivation. Plaintiff therefore does not establish a genuine factual dispute as to
27 the purpose of placing him in the restraints.

28 Plaintiff testified during his deposition that he did not remember the identify of the person

1 who he claims kicked him in the groin while he was in 4-point restraints. D MSJ 21 at 79:6-7 and 19
2 - 20. He also testified that he could not recall who hit him in the shoulder. D MSJ 22 at 82: 10 -12.
3 Defendants assert that they are therefore entitled to summary adjudication on these claims under
4 Taylor v. List. The court finds that defendants have met their burden as the moving parties of
5 informing the court of the basis for this portion of their motion. The burden therefore shifts to
6 plaintiff to establish the existence of a genuine issue as to any material fact. See Matsushita Elec.
7 Indus. Co. v. Zenith Radio Corp., 475 U.S. at 586.

8 In his opposition to defendants' motion, plaintiff argues that a video recording does not exist
9 for the March 20, 2003, incident, which constitutes a "spoliation," because this is when defendant
10 Falge kicked plaintiff in the groin. In his opposition, Plaintiff also identifies defendant Kelly for the
11 first time as the person who allegedly "assaulted" him by striking him on the shoulder. Plaintiff's
12 claim regarding spoliation is rejected above. Further, plaintiff provides no evidence to support his
13 sudden identification of defendants Falge and Kelly as the persons who allegedly kicked him in the
14 groin and struck him on the shoulder. These persons were not identified in plaintiff's first amended
15 complaint and in his deposition, plaintiff disavowed remembering who had kicked him or struck his
16 shoulder. Plaintiff having failed to tender any evidence to support his claim, the court finds that
17 plaintiff has failed to carry his burden of establishing a genuine issue regarding who kicked or struck
18 him.

19 Plaintiff claimed in his deposition that defendant Cobbs purposefully placed an ankle
20 restraint on too tightly, causing an injury to plaintiff's ankle. D MSJ 22 at 83-85. On September 7,
21 2003, plaintiff submitted a medical kite to that effect. Plaintiff confirmed in his deposition that the
22 cut was above his ankle and about three inches long. D MSJ 023 at 86 - 87. He stated that he did
23 not need stitches, and was told to put ointment on the cut and expose it to the air. D MSJ 23 at
24 87:12-13. Defendants contend that there is no evidence to support either the objective or the
25 subjective component of an Eighth Amendment claim. The court finds that defendants have met
26 their burden as the moving parties of informing the court of the basis for this portion of their motion.
27 The burden therefore shifts to plaintiff to establish the existence of a genuine issue as to any material
28 fact. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. at 586.

1 In his opposition to the motion for summary judgment, plaintiff argues that defendant Cobb
2 was acting in retaliation when he applied the restrain too tightly, and that plaintiff's injury was not de
3 minimus. Plaintiff provides no evidence to support these arguments. The court finds, therefore, that
4 plaintiff has failed to carry his burden of establishing the existence of a genuine issue as to the nature
5 of his injuries. Further, the court finds, under the evidence of plaintiff's own deposition, plaintiff's
6 injury was not serious enough to satisfy the objective component of his Eighth Amendment claim.
7 See Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996) (summary judgment correctly granted to
8 defendants where prisoner plaintiff suffered pain and cuts, where plaintiff did not allege cruel
9 conduct causing discomfort beyond that inherent from movement in restraints); Barker v. Fugazzi,
10 18 Fed.Appx. 663 (9th Cir. 2001)(where plaintiff alleged that restraints were too tight, his allegations
11 of injury were not serious enough to satisfy either the objective or the subjective elements of an
12 Eighth Amendment claim).

13 Defendants contend that no reasonable juror could conclude that plaintiff was sexually
14 assaulted as he claims in his fifth cause of action. On July 11, 2003, plaintiff filed an emergency
15 grievance around 11:00 a.m. claiming that he had been sexually assaulted by defendant Kelly. D
16 MSJ 399. Plaintiff claimed that the assault occurred when he returned to his cell from the yard, and
17 that defendant Kelly placed his finger in Ortiz' anus when plaintiff knelt down to have his ankle
18 restraints removed. Id. Plaintiff claimed that former correctional officer Chayton Hall was the
19 second unit officer escorting plaintiff back to his cell, and that Mr. Hall was present when the alleged
20 assault occurred. Id. Defendant Schaff, the shift sergeant, responded to plaintiff's cell to investigate
21 plaintiff's allegation of assault. Id. In the incident report filed by defendant Schaff on the matter,
22 Schaff stated that when he asked plaintiff if the accusation of sexual assault were true, plaintiff
23 admitted the accusation was not true and that he had lied, and stated, "but it's in an official record
24 now." D MSJ 400; 785. Because plaintiff told defendant Schaff he had made up the allegation,
25 Defendant Schaff responded in the emergency grievance that the grievance was not an "emergency"
26 as defined by AR 740. D MSJ 399, 785.

27 Plaintiff filed a second emergency grievance the same day at 2:31 p.m., again claiming that
28 he been sexually assaulted by defendant Kelly. D MSJ 401. Defendant Neagle, who was the shift

1 sergeant on duty, responded to plaintiff's cell, and also responded that the allegation was "not an
2 emergency," based on plaintiff's admission earlier in the day that the alleged assault claim was false.
3 Id. Plaintiff was examined by the ESP medical department on July 17, 2003, for any evidence of
4 sexual assault. D MSJ (sealed) 20. The result of the medical evaluation was that there was no
5 evidence of sexual assault. Id.

6 In addition to plaintiff being examined medically, the matter was referred to the NDOC
7 Inspector General's Office, who, in turn referred the matter to the Nevada Attorney General's Office
8 to conduct a criminal investigation. Investigators were assigned to the case, and they traveled to
9 ESP to interview plaintiff. The Attorney General's investigation was eventually closed without
10 referral for prosecution due to lack of evidence brought on by plaintiff's inconsistent statements to
11 investigators and refusal to submit to a polygraph examination. D MSJ 797. The court finds that
12 defendants have met their burden as the moving parties of informing the court of the basis for this
13 portion of their motion. The burden therefore shifts to plaintiff to establish the existence of a
14 genuine issue as to any material fact. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475
15 U.S. at 586.

16 In opposition to defendants' motion, plaintiff argues that defendants offer only circumstantial
17 and hearsay evidence having little probative value to prove their position. He claims that both
18 incident reports by defendant Schaff regarding the alleged sexual assault are self-serving documents,
19 prepared in preparation for litigation. As the party opposing defendants' motion for summary
20 judgment, plaintiff is required to tender evidence of specific facts in the form of affidavits, and/or
21 admissible discovery material, in support of its contention that the dispute exists. Rule 56(e);
22 Matsushita, 475 U.S. at 586 n.11. The court finds that Plaintiff's attempts to challenge defendants'
23 evidence is insufficient to meet this requirement. The court further finds that in light of the
24 evidence presented by defendants, no reasonable juror could find for plaintiff on this issue.

25 In light of all of the above, the court finds that defendants are entitled to summary
26 adjudication on plaintiff's fifth cause of action.

27 Sixth Cause of Action

28 In his sixth cause of action, plaintiff alleges that defendants have violated his right to petition

1 for redress of grievances and to access to the courts as guaranteed by the First and Fourteenth
2 Amendments. Plaintiff claims that defendants have done so by: 1) limiting the number of grievances
3 he can file; 2) retaliating against him for filing too many grievances; 3) placing him in the ESP
4 “torture chamber” (9A-30) in order to deter him from filing grievances; 4) withholding grievance
5 forms; 5) writing notice of charges against plaintiff for filing too many grievances and/or allegedly
6 making false statements in grievances filed; 6) imposing harsher punishments on plaintiff than on
7 other inmates in retaliation for filing grievances; and 7) disregarding any grievance containing
8 disrespectful language.

9 Allegations of retaliation against a prisoner's First Amendment rights to speech or to petition
10 the government may support a section 1983 claim. Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir.
11 1985); see also Valandingham v. Bojorquez, 866 F.2d 1135 (9th Cir. 1989). To establish a prima
12 facie case, plaintiff must allege and show that defendants acted to retaliate for his exercise of a
13 protected activity, and defendants' actions did not serve a legitimate penological purpose. See
14 Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir. 1994); Pratt v. Rowland, 65 F.3d 802, 807 (9th Cir.
15 1995). A plaintiff asserting a retaliation claim must demonstrate a "but-for" causal nexus between
16 the alleged retaliation and plaintiff's protected activity (i.e., filing a legal action). McDonald v. Hall,
17 610 F.2d 16, 18 (1st Cir. 1979); see Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S.
18 274 (1977). The prisoner must submit evidence, either direct or circumstantial, to establish a link
19 between the exercise of constitutional rights and the allegedly retaliatory action. Pratt, 65 F.3d at
20 806. Timing of the events surrounding the alleged retaliation may constitute circumstantial evidence
21 of retaliatory intent. See Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1316 (9th Cir. 1989).
22 “Within the prison context, a viable claim of First Amendment retaliation entails five basic elements:
23 (1) an assertion that a state actor took some adverse action against an inmate (2) because of (3) that
24 prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First
25 Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal.”
26 Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005).

27 In regard to plaintiff's claim that he was placed in cell 9A-30 to deter him from filing too
28 many grievances, defendants argue that plaintiff's disciplinary history report shows that he was

1 placed there because of his destructive and abusive behavior, not to deter filing grievances. D MSJ
2 666-667. They further argue that plaintiff's grievances filed while he was confined to cell 9A-30
3 demonstrate that he was not deterred from filing grievances. D MSJ 391-471. Finally, defendants
4 argue that the grievances submitted as exhibits necessarily also demonstrate that grievance forms
5 were not being withheld from plaintiff.

6 Responding to plaintiff's allegation that he was issued a notice of charges for filing too many
7 grievances and abusing the grievance process, defendants state that plaintiff was issued two notices
8 of charges for abusing the grievance process. One of the charges was dismissed through the appeal
9 process, D MSJ 612, and one charge was upheld. The notice of charges that was upheld, dated July
10 2003, was prompted by plaintiff's false claim that defendant Kelly sexually assaulted him and
11 plaintiff's written statements about defendant Endel's character. D MSJ 645.

12 Plaintiff alleges he received harsher punishments than other inmates in retaliation for filing
13 grievances. The only example plaintiff could provide in relation to this allegation during his
14 deposition was the loss of yard issued discussed above under the first cause of action. D MSJ 32 at
15 124 - 126. Defendants argue that the legitimate penological goal for the loss of yard was the attempt
16 to bring plaintiff's inappropriate behavior under control.

17 In response to plaintiff's complaint that defendants ignore any grievance containing
18 disrespectful language, defendants argue that the grievances in question are not meant to convey a
19 legitimate grievable issue as envisioned by the First Amendment, but are intended to abuse the
20 prison official in question and the grievance process. Defendants cite as an example a grievance in
21 which plaintiff claims he heard a rumor about personal issues concerning Defendant Endel. D MSJ
22 646.

23 The court finds that defendants have met their burden as the moving parties of informing the
24 court of the basis for this portion of their motion. The burden therefore shifts to plaintiff to establish
25 the existence of a genuine issue as to any material fact. See Matsushita Elec. Indus. Co. v. Zenith
26 Radio Corp., 475 U.S. at 586.

27 In opposing defendants' motion for summary judgment, plaintiff offers no evidence of
28 specific facts such as would establish the existence of genuine issue of material fact. Plaintiff simply

1 repeats the claims made in his complaint. As set forth above “the opposing party may not rely upon
2 the denials of its pleadings, but is required to tender evidence of specific facts in the form of
3 affidavits, and/or admissible discovery material, in support of its contention that the dispute exists.”
4 Rule 56(e); Matsushita, 475 U.S. at 586 n.11. Thus, plaintiffs claims are insufficient to carry his
5 burden. The court finds, therefore, that no genuine issue of material fact exists and that defendants
6 are entitled to summary adjudication on this sixth cause of action.

7 Seventh Cause of Action

8 Plaintiff alleges that defendants have impeded his access to the courts by the following: 1)
9 not allowing him to make phone calls to his attorney; 2) conducting frequent shake-downs of
10 plaintiff’s cell where his legal papers were left in disarray or confiscated; 3) forcing plaintiff to
11 appear in socks; 4) delaying plaintiff’s legal mail on unfounded pretexts; 5) urinating on plaintiff’s
12 legal mail; 6) stealing plaintiff’s stamps; 7) refusing to provide plaintiff a copy of all notice of
13 charges filed against him; 8) turning on plaintiff’s shower in order to flood his cell and destroy his
14 legal paperwork; 9) denying plaintiff the right to review his medical records except in half-hour
15 stretches; and 10) denying plaintiff access to library legal material for extended periods. Plaintiff
16 claims that defendants have thereby violated his rights under the First and Fourteenth Amendments.

17 A prisoner alleging a violation of his right of access to the courts must demonstrate that he
18 has suffered “actual injury.” Lewis v. Casey, 518 U.S. 343, 349-50 (1996). The right to access the
19 courts is limited to direct criminal appeals, habeas corpus proceedings, and civil rights actions
20 challenging conditions of confinement. Id. at 354-55. “An inmate cannot establish relevant actual
21 injury simply by establishing that his prison’s law library or legal assistance program is sub-par in
22 some theoretical sense.” Id. at 351. Rather, the inmate “must go one step further and demonstrate
23 that the library or legal assistance program hindered his efforts to pursue a legal claim.” Id. The
24 actual-injury requirement mandates that an inmate “demonstrate that a nonfrivolous legal claim had
25 been frustrated or was being impeded.” Id. at 353. In Lewis v. Casey, the Supreme Court defined
26 prisoners’ right of access to the courts as simply the “right to bring to court a grievance.” Id. at 354.
27 The Court specifically rejected the notion that the state must enable a prisoner to “litigate effectively
28 once in court.” Id. (quoting and disclaiming language contained in Bounds v. Smith, 430 U.S. 817,

1 825-26 (1977)); see also Cornett v. Donovan, 51 F.3d 894, 898 (9th Cir. 1995) (determining that
2 prisoners' right of access to the courts is limited to the pleading stage of a civil rights action or
3 petition for writ of habeas corpus).

4 In opposition to defendants' arguments, plaintiff argues that defendants allowed for or
5 participated in the theft of plaintiff's legal papers on January 27, 2003, and caused or participated in
6 allowing plaintiff's access to the E.S.P. law library to be limited or denied for extended periods.
7 Plaintiff claims that this resulted in the loss of civil rights law suits case nos. 3:01-cv-0018, and 3:03-
8 cv-0424. In regard to case no. 3:01-cv-0018, he argues that defendants violated various prison
9 procedures and rules in confiscating and attempting to return his legal papers. In regard to case no.
10 3:03-cv-0424, plaintiff argues that defendants have not cited authority for their argument that access
11 to the courts requires only access which meets constitutional minimums.

12 The court finds that defendants have met their burden as the moving parties of informing the
13 court of the basis for their motion. The burden therefore shifts to plaintiff to establish the existence
14 of a genuine issue as to any material fact. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
15 475 U.S. at 586 . The court finds that plaintiff has failed to carry this burden in regard to his seventh
16 cause of action. Plaintiff's claims that defendants stole his legal papers, limited or denied access to
17 the prison library, and violated prison procedures and rules in confiscating and attempting to return
18 his legal papers do not address the issue in this access to court claim. That is that an inmate show
19 actual injury by demonstrating that a nonfrivolous legal claim had been frustrated or was being
20 impeded. See Lewis v. Casey, 518 U.S. at 353. The prior civil rights suits brought by Plaintiff,
21 3:01-cv-00018 and 3:03-cv-00424, were both decided on the merits. In 3:01-cv-00018, Plaintiff did
22 not respond to Defendant's motion for summary judgment and alleged that his legal papers were
23 confiscated and not returned, "irreparably damag[ing]" Plaintiff's position as a litigant. Although the
24 Defendants contended that their motion should be granted based upon Plaintiff's failure to respond,
25 the Magistrate Judge refused to do so in light of Plaintiff's pro se status and addressed all of the
26 essential issues of the case on the merits. The Magistrate's Report and Recommendation was
27 accepted by the District Court and judgment was entered against Plaintiff on the merits. No appeal
28 was filed by Plaintiff.

1 In civil rights suit 3:03-cv-00424, two motions for summary judgment on behalf of the
2 Defendants were presented to the court and were fully briefed by the parties. The court thereafter
3 granted summary judgment against Plaintiff in an 11-page decision, which was decided on the
4 merits. No appeal of the court's decision was pursued by Plaintiff.

5 Plaintiff has completely failed to show that any actions by Defendants in this action have
6 resulted in the loss of the two aforementioned civil rights actions. No prejudice to Plaintiff having
7 been shown, Plaintiff's claims do not establish a genuine issue of material fact such as would defeat
8 summary adjudication on this issue. Further, because plaintiff has failed to show actual injury, an
9 essential element of his first amendment claim, defendants are entitled to judgment as a matter of
10 law on this seventh cause of action.

11 Eighth Cause of Action

12 In his eighth cause of action, plaintiff alleges violations of his right to due process as
13 guaranteed under the Fourteenth Amendment. Plaintiff claims that defendants have exercised a
14 policy of filing false notices of charges against plaintiff in retaliation for filing grievances, routinely
15 failing to timely serve notices of charges on him or advise him of scheduled hearing dates, refusing
16 to allow plaintiff to call any witnesses or put on any type of defense at hearings, and refusing
17 plaintiff's repeated requests that a camera and recording device be placed in his cell. Plaintiff claims
18 that as a result, he has had his stay at ESP for disciplinary segregation extended from his initial out
19 date of July 19, 2002, to the current out date of February 13, 2011.

20 Defendants contend that they are entitled to summary adjudication on this cause of action,
21 stating that plaintiff was written up 35 times for disciplinary infractions during the time period of this
22 case. Defendants argue as follows: 1) prisoners do not have a due process right to cameras or
23 recording devices in their cells; 2) two of the notices of charges were written at Nevada State Prison
24 and are therefore not implicated in the instant action; 3) seven of the remaining 33 notices of charges
25 were written or heard by individuals who were not named in the instant litigation or dismissed by the
26 court; 4) only 9 of the remaining notices of charges which could be at issue in this case were written
27 by named defendants, and all of those notices of charges were supported by some evidence.

28 In opposition to defendants' motion, plaintiff contends that defendant McDaniel violated his

1 right to due process each time he denied plaintiff's notice of charges appeals and affirmed the
2 findings of guilt based on the "some evidence" standard. Plaintiff further contends that defendants
3 are not entitled to summary judgment because he presents some evidence that the disciplinary action
4 against him was retaliatory.

5 The court finds that defendants have met their burden as the moving parties of informing the
6 court of the basis for their motion. The burden therefore shifts to plaintiff to establish the existence
7 of a genuine issue as to any material fact. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
8 475 U.S. at 586 . The court finds that plaintiff has failed to carry this burden in regard to his eighth
9 cause of action. While plaintiff claims that some evidence supports his claim that the notices of
10 charges against him were retaliatory, this alleged fact is not material to plaintiff's due process claim.
11 The standard for challenging a prison disciplinary hearing is whether some evidence supports the
12 hearing officer's decision. Plaintiff does not deny that such evidence exists, and so fails to establish
13 a genuine issue as to this, or any other, material fact. Defendants have provided citations to the
14 record showing that some evidence exists as to each of the 9 notices of charges actually at issue in
15 this case. The court finds, therefore, that defendants are entitled to judgment as a matter of law on
16 this eighth cause of action.

17 Tenth Cause of Action

18 In his tenth cause of action, plaintiff claims that in doing the things alleged in his complaint,
19 defendants have conspired to deprive him of equal protection of the law based on the fact that he is a
20 Mexican. Plaintiff claims that in doing so, defendants have violated 42 U.S.C. § 1985.

21 The relevant portion of the statute, 42 U.S.C. § 1985(3), prohibits two or more persons from
22 conspiring to deprive any person or class of persons of the equal protection of the law. The elements
23 of a § 1985(3) claim are: (1) the existence of a conspiracy to deprive the plaintiff of the equal
24 protection of the laws; (2) an act in furtherance of the conspiracy and (3) a resulting injury. Scott v.
25 Ross, 140 F.3d 1275, 1284, rehearing den., 151 F.3d 1247 (9th Cir.1998).

26 Defendants move for summary adjudication of this cause of action, contending that plaintiff's
27 testimony demonstrates that he cannot show there was a conspiracy to deprive him of his
28 constitutional rights. Specifically, defendants argue that plaintiff cannot identify any act by any

1 particular defendant that deprived him of his civil rights. Plaintiff claimed in his deposition that he
2 heard an unidentified person call him a “wetback,” but admits that he didn’t remember any of the
3 named defendants making any racial slurs during the operative time for this complaint. D MSJ 47 -
4 48. Defendants argue that this, standing alone, fails to state a claim for conspiracy. In opposition to
5 defendant’s motion, plaintiff argues that defendants conspired to commit “each act” alleged in the
6 complaint, and that “the facts as a whole meet the requirement to state a claim for civil conspiracy.”

7 The court finds that defendants have met their burden as the moving parties of informing the
8 court of the basis for their motion. The burden therefore shifts to plaintiff to establish the existence
9 of a genuine issue as to any material fact. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
10 475 U.S. at 586 . The court finds that plaintiff has failed to carry this burden in regard to his tenth
11 cause of action. Again, “the opposing party may not rely upon the denials of its pleadings, but is
12 required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery
13 material, in support of its contention that the dispute exists.” Rule 56(e); Matsushita, 475 U.S. at
14 586 n.11. In light of this court’s finding that defendants are entitled to summary adjudication on
15 each of plaintiff’s remaining causes of action, Plaintiff’s general reference to the facts alleged in the
16 complaint are insufficient to meet this standard. Further, the court agrees with defendants that
17 plaintiff’s claim regarding racial slurs by unidentified persons who are not parties to this action
18 provides no support for plaintiff’s conspiracy claim. The court finds, therefore, that defendants are
19 entitled to judgment as a matter of law on this tenth cause of action.

20 CONCLUSION

21 **IT IS THEREFORE ORDERED** that plaintiff’s motion for a finding that defendants
22 committed acts of spoliation (Docket # 188) and second motion for the finding of spoliation against
23 defendants (Docket # 234) are **DENIED**.

24 **IT IS FURTHER ORDERED** that defendants’ motion for leave to file a brief in excess of
25 pages limits imposed by Local Rule 7-4 (Docket # 251) is **GRANTED**.

26 **IT IS FURTHER ORDERED** that defendants’ motion for a one-day extension of time to
27 file their opposition to plaintiff’s second motion (Docket #263) for summary judgment is
28 **GRANTED**.

1 **IT IS FURTHER ORDERED** that plaintiff's motion for leave to file a supplemental brief to
2 plaintiff's motion for summary judgment (Docket # 261) is **DENIED**.

3 **IT IS FURTHER ORDERED** that defendants' second motion for summary judgment
4 (Docket # 255) is **GRANTED** in its entirety.

5 **IT IS FURTHER ORDERED** that plaintiff's second motion for summary judgment
6 (Docket # 241) is **DENIED as moot**.

7 **IT IS FURTHER ORDERED** that all other pending motions in this case are **DENIED** as
8 moot.

9 **IT IS FURTHER ORDERED** that the clerk shall enter judgment in accordance with this
10 order and close this case.

11 DATED this 24th day of March, 2009.



LARRY R. HICKS
UNITED STATES DISTRICT JUDGE